Supreme Court, U.S
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No. 01-1359

In The

Supreme Court of the United States

LUKE ARMOUR,

Petitioner,

v.

K.D.G. and T.S.G.,

Respondents.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state statute that allows the adoption of a child born out of wedlock and the automatic termination of the biological father's rights if the father fails to file court action to claim paternity and custody within thirty days of giving notice of his intention to do so deprive such a father of his Fourteenth Amendment rights to due process and equal protection?

2. Did the Nebraska Supreme Court deprive Petitioner of his rights to procedural and substantive due process by holding that he lacked standing to challenge the procedural errors committed by the trial court in the adoption proceedings for his daughter?

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Though notified of the appeal, the State of Nebraska neither entered an appearance nor participated in the appeal.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents, K.D.G. and T.S.G., adoptive parents of Baby Girl H., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Nebraska Supreme Court's opinion in this case.

OPINIONS AND ORDERS BELOW

The December 12, 2001 order of the Nebraska Supreme Court denying Mr. Armour's motion for rehearing (Pet.'s Appendix A) is unreported.

The November 2, 2001 opinion of the Nebraska Supreme Court, *In re Adoption of Baby Girl H.*, is reported at 262 Neb. 775, 635 N.W.2d 256 (2001). (Pet.'s Appendix B sets forth the initial decision issued by the Nebraska Supreme Court. However, the official version will reflect a correction made by the court following the release of its decision. In the last paragraph and the third to the last paragraph of the decision, the references to the "district" court have been changed to the "county" court.)

The September 21, 2000 decree of adoption entered by the Gosper County Court (Pet.'s Appendix C) is unreported.

The September 15, 2000 order (filed September 20, 2000) entered by the Gosper County Court denying Mr.

Armour further notice in the adoption proceedings (Pet.'s Appendix D) is unreported.

The April 7, 2000 opinion of the Nebraska Supreme Court in a connected case, *Luke Armour v. L.H.* (Pet.'s Appendix E) is reported at 259 Neb. 138, 608 N.W.2d 599 (2000).

STATEMENT OF JURISDICTION

Respondents accept petitioner's jurisdictional statement as set forth on pages 2 through 4 of petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents accept petitioner's recitation of the constitutional and statutory provisions as set forth on pages 4 and 5 and Appendix F to petitioner's brief.

STATEMENT OF THE CASE

On April 7, 2000, the Nebraska Supreme Court decided the first appeal of Luke Armour (hereinafter Armour). *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). (Pet.'s Appendix E) In that case, Armour filed a petition in the District Court for Gosper County, Nebraska for an adjudication of paternity and custody pursuant to NEB. REV. STAT. § 43-104.05 (Reissue 1998). *Id.* 259 Neb. at 139, 608 N.W.2d at 601. On September 22,

1998, the biological mother of Baby Girl H. (hereinafter L.H.) demurred to Armour's petition asserting that the district court lacked subject matter jurisdiction. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 778, 635 N.W.2d 256, 260 (2001). Thus, as of September 22, 1998, Armour was on notice that he was seeking relief in a court without jurisdiction to grant him the relief he sought, including requested visitation rights.

On November 16, 1998, following a determination that it lacked subject matter jurisdiction, the District Court of Gosper County, Nebraska, sustained the demurrer of L.H. and dismissed Armour's petition. *Armour v. L.H.*, 259 Neb. 138, 140, 608 N.W.2d 599, 602 (2000). Rather than file his action in the appropriate court, which was the County Court for Gosper County, Armour elected to appeal the dismissal of his case. On April 7, 2000, the Nebraska Supreme Court affirmed the Gosper County District Court's ruling and dismissed Armour's appeal. *Armour v. L.H.*, 259 Neb. 138, 145, 608 N.W.2d 599, 605 (2000). Armour raised no constitutional arguments in his first appeal. The mandate was issued on May 15, 2000. (Respondents' Appendix A)

Following the dismissal of his appeal and the issuance of the mandate by the Nebraska Supreme Court, Armour did nothing.

Eventually, on July 17, 2000, K.D.G. and T.S.G., filed a petition for the adoption of Baby Girl H. in the County Court for Gosper County, Nebraska. *See* Transcript from the trial court, Record on Appeal to Nebraska Supreme Court at T1-15. They also filed a "Motion for Determination of Notice

Pursuant to NEB. REV. STAT. § 43-104.05 and Notice of Hearing."[1] (T60-62) On July 17, 2000, along with their petition, K.D.G and T.S.G. filed a praecipe requesting the issuance of summons and personal service on Armour of the following: 1) the summons; 2) the petition for adoption; 3) the Motion for Determination of Notice Pursuant to NEB. REV. STAT. § 43-104.05 and Notice of Hearing; and 4) an ex parte order sealing the court file. (T56) On September 15, 2000, the Sheriff of Custer County, Nebraska, filed his return of service with the court showing personal service on Armour on July 19, 2000. (T38-53) Contrary to Armour's assertion in his brief that " . . . [he] could not even obtain a copy of the pleadings" (Petitioner's brief at 8), the record shows he was served with a copy of the petition and the motion for determination of notice. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 778, 635 N.W.2d 256, 261 (2001) ("The record shows that Armour was served with a copy of the petition.")

A hearing on the motion for determination of notice was held in the Gosper County Court on September 15, 2000. *See* Bill of Exceptions from the trial court, Record on Appeal to Nebraska Supreme Court at 7:22; 8:7-9. At the time of the hearing, Armour was 20 years old and was incarcerated. (36:13-20) Armour testified at the hearing that he first learned of L.H.'s pregnancy in June or July of 1998, before the birth of Baby Girl H., although he acknowledged having sexual relations with L.H. in 1997, and admitted L.H. had told him in October of 1997 that she "might" be pregnant. (21:23-25; 22:1-2) (E9,2 and 23-24:19, Vol. II) Shortly after telling him she might be pregnant, L.H. moved to Stratton,

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[1] The full text of NEB. REV. STAT. § 43-104.05 is set forth in Petitioner's brief at Appendix F8-F9.

Nebraska to live with her aunt and uncle. Following L.H.'s move to Stratton, Armour was aware of L.H.'s telephone number and address. He called her on the telephone and wrote her at least one letter. (E9,24:19 Vol. II) L.H. gave birth to Baby Girl H. on July 22, 1998. (22:7-9) In late July, Armour was notified by both L.H. and Lutheran Family Services of the birth of Baby Girl H. (24:13-19) (E9,24:19, Vol. II) (E11,1:25, Vol. II) Exhibit 11 reflects the fact that Armour received a notification letter from Lutheran Family Services on August 3, 1998. (E11,3:25, Vol. II) On August 4, 1998, Armour filed with the Nebraska Department of Health and Human Services (hereinafter "the Department") a Notice of Intent to Claim Paternity and Obtain Custody. (27:3-25; 28:1-4) (E1,1-3:4, Vol. II) The notice signed by Armour on August 4, 1998 provided:

> I understand that if a petition is not filed in the *county* court in the county of residence of said child for an adjudication of my claim of paternity and right to custody *within thirty (30) days* after the filing of this notice, my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

(33:19-25; 34:1-17) (E1,2:4, Vol. II) (Emphasis supplied.) Armour testified that he was a high school graduate, that he could read and write the English language, that he signed the Notice of Intent to Claim Paternity and Obtain Custody, and that he understood the foregoing language in the notice. (32:20-25; 33:1-4; 34:1-20; 42:21-23) Armour admits that he did not file a petition in the Gosper County Court within thirty days of signing and filing his notice with the Department. (35:5-8) Further, Armour admits that *at no time* has he ever filed a petition in the county court for adjudication of

his claim of paternity and right to custody of Baby Girl H. (35:9-14) Armour testified that he has never had contact with Baby Girl H. (31:14-16) The record is devoid of any evidence that Armour has contributed financially to medical expenses or other support for either Baby Girl H. or L.H., either before or after the birth of the child. Following the hearing, the trial court ruled that Armour had not complied with the provisions of NEB. REV. STAT. § 43-104.05, and that he was not entitled to any further notice in the adoption proceeding. (Pet's Appendix D)

On September 21, 2000, the petition for adoption of Baby Girl H. came on for hearing. Following the hearing, a decree of adoption was entered. (Pet's Appendix C) Armour again appealed.

In Armour's second appeal, the Nebraska Supreme Court determined that the Nebraska adoption statutes adequately protected Armour's opportunity to form a relationship with his child, but because of his own inaction and his ignorance of the law, he had failed to grasp that opportunity. "The failure to properly follow § 43-104.05 because of ignorance of the law can not be a sufficient reason for criticizing the law itself. . . . Further, after our decision in *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000), Armour failed to make any further attempts to comply with § 43-104.05. As a result, Armour failed to ever file a petition for adjudication of paternity in county court." *In re Adoption of Baby Girl H.*, 262 Neb. 775, 783, 635 N.W.2d 256, 264 (2001).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE NEBRASKA SUPREME COURT'S DECISION THAT NEBRASKA'S STATUTORY ADOPTION SCHEME ADEQUATELY PROTECTED ARMOUR'S OPPORTUNITY TO FORM A RELATIONSHIP WITH HIS CHILD IS CONSISTENT WITH FEDERAL CONSTITUTIONAL PRECEDENT.

A. Where Armour's Only Link to Baby Girl H. is a Potential Relationship, this Court's Focus is on Whether Nebraska's Statutory Scheme Adequately Protects Armour's Opportunity to Form a Relationship With his Child.

Armour claims that Nebraska's statutory scheme relating to the adoption of children born out of wedlock is constitutionally infirm in two respects: 1) the statutes are facially unconstitutional; and 2) the statutes, as applied to Armour, operate to deprive him of his right to due process and equal protection. Armour argues that because NEB. REV. STAT. § 43-104.05 (Reissue 1998) allows for the "automatic termination" of an unwed father's rights if he fails to meet the thirty-day statute of limitations set forth in that statute, it deprives a putative father of a fundamentally fair procedure. In relation to Armour's claim that the adoption statutes, as applied to him, deprive him of due process and equal protection, Armour complains that the thirty-day statute of limitation found in 43-104.05 is simply "too short" and that the adoption statutes treat unwed fathers differently than married fathers without a legitimate state interest for differentiating between them. Armour's claims ignore the realities of this particular case and the constitutional precedent established by both this Court and the Nebraska Supreme Court.

Armour asserts that the "only" reason for requiring a putative father to file a petition in accordance with 43-104.05 is "the apparent sake of expediency in freeing children for adoption." Petitioner's brief at 19. While expediency in adoptions is certainly a legitimate state interest, the Nebraska Supreme Court in *Shoecraft v. Catholic Soc. Servs. Bureau,* 222 Neb. 574, 385 N.W.2d 448 (1986), recognized additional legitimate and compelling state interests. The court noted that "the state has a compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care." *Id.* 222 Neb. at 577, 385 N.W.2d at 451. The court also recognized that "the transfer of children by relinquishment from unwed mothers and the adoption of those children are also compelling state interests . . . " *Id.* Further, the court noted that "a rapid determination of the rights, if any, of an unwed father to object to a relinquishment and subsequent adoption is in the best interests of the child, the relinquishing mother, and of the prospective adoptive parents." *Id.* 222 Neb. at 579, 385 N.W.2d at 452. The court held that "the problems of unwed births and adoptions are legitimate concerns of the Legislature." *Id.* 222 Neb. at 580, 385 N.W.2d at 452. Likewise, the Eighth Circuit found that the State of Nebraska has a legitimate and important interest in establishing a stable environment for adopted children. *Syrovatka v. Erlich,* 608 F.2d 307 (8th Cir. 1979). Those holdings are consistent with those of this Court. *Lehr v. Robertson,* 463 U.S. 248, 265, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983) (states have legitimate interests "in facilitating the adoption of young children and having the adoption proceeding completed expeditiously").

Recognizing that the state has legitimate and compelling interests in adoptions, a court must determine the nature of

the relationship which is sought to be protected in a case such as this. On this point, courts have distinguished between an unwed father who has an established familial bond with a child and an unwed father who has a mere biological link with a child. While the relationship between parent and child is constitutionally protected regardless of the marital status of the father, the status of an unwed father is readily distinguishable from that of a separated or divorced father and the state can permissibly give an unwed father less veto authority than it provides to a married father. *Quilloin v. Walcott,* 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed.2d 511 (1978). *See also Shoecraft v. Catholic Soc. Servs. Bureau,* 222 Neb. 574, 385 N.W.2d 448 (1986). In addition, this Court has recognized a distinction between the termination of an *opportunity* to form a familial bond with a child and the termination of an *established* familial bond with a child, with different levels of scrutiny afforded to each. *Lehr v. Robertson,* 463 U.S. 248 (1983). *See also In re Application of S.R.S. and M.B.S.,* 225 Neb. 759, 408 N.W.2d 272 (1987) (the mere existence of biological link does not merit equivalent constitutional protection). In *Friehe v. Schaad,* 249 Neb. 825, 545 N.W.2d 740 (1996) and *In re Application of S.R.S. and M.B.S.,* 225 Neb. 759, 408 N.W.2d 272 (1987) the Nebraska Supreme Court held that a distinction exists between the termination of an opportunity to form a familial bond and the termination of an established familial bond, warranting different levels of constitutional protection. In doing so, the court relied extensively on *Lehr* concluding that the proper test in cases such as the one at bar is an intermediate scrutiny test relative to an important governmental objective and substantially related means of obtaining such objective. *Friehe,* 249 Neb. at 833, 545 N.W.2d at 746. Thus, where an unwed father's only

link to a child is a potential relationship, a court's focus is on whether a state's statutory scheme adequately protects his opportunity to form a relationship with the child. *Lehr v. Robertson,* 463 U.S. 248, 262 (1983). In the present case, Armour's link to Baby Girl H. is a mere biological link. Armour does not argue that he has an established familial relationship with Baby Girl H. and the record would not support such a claim. Armour and L.H. were never married and never lived together. (22:3-4) Armour has never had any contact with Baby Girl H. (31:14-16) Rather, Baby Girl H. has at all times since July 29, 1998, been in the care of her adoptive parents, K.D.G. and T.S.G. (58:24-25; 59:1-6) At no time has Armour ever filed a petition to adjudicate his claims to Baby Girl H. in the County Court for Gosper County, Nebraska, as required by 43-104.05. (35:5-14) The record is devoid of any evidence that Armour has contributed financially to medical expenses or other support for either Baby Girl H. or L.H. As noted by the Court in *Lehr,* "[t]he significance of the biological connection is that it offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring." *Id.* 463 U.S. at 262. (Emphasis supplied.) Absent a "significant custodial, personal, or financial relationship" with the child, a court's only concern is whether the state has adequately protected the natural father's opportunity to form such a relationship. *Id.* 463 U.S. at 263.

B. Nebraska's Statutory Scheme Relating to the Adoption of Children Born Out of Wedlock Adequately Protects a Putative Father's Opportunity to Form a Relationship With his Offspring.

The Due Process Clause of the Fourteenth Amendment requires that an unwed father be provided adequate notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). *See also Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). In July and August of 1998, Nebraska's statutory adoption scheme provided that notice be given to seven categories of putative fathers. NEB. REV. STAT. § 43-104.12 (Reissue 1998). (Pet's Appendix F13-14) Armour fell under two of the seven categories: §§ 43-104.12(5) and 43-104.12(7). Thus, notice to Armour was mandated by law.

NEBRASKA REVISED STATUTE § 43-104.13 (Reissue 1998) sets forth the information which must be provided to putative fathers such as Armour. (Pet's Appendix F14-15) Two of the provisions of that statute are particularly relevant to this case. Pursuant to § 43-104.13(5)(d), a putative father must be told that he has a right to "file a notice of intent to claim paternity and obtain custody of the child pursuant to section 43-104.02." Additionally, pursuant to § 43-104.13(6), a putative father must be told that "if he wishes to seek custody of the child he should seek legal counsel from his own attorney immediately." Armour testified that Exhibit 11 is the actual letter he received from Lutheran Family Services. (26:7-13) Exhibit 11 specifically notified Armour that he had certain rights, including the right to "[f]ile a notice of intent to claim paternity and obtain custody of the child." (E11,1:25, Vol. II) Exhibit 11 further notified Armour:

> If you wish to establish your rights as the biological father of the child, you must file a notice with the biological father registry maintained by the Nebraska Department of Health and Human Services. Such a notice must be on a special form provided by the Department and must be filed *no later* than five business days after the birth of the child or your receipt of this letter, whichever is later. If you wish to pursue custody of this child, you should seek counsel from your own attorney immediately.

(E11,1:25, Vol. II) (Emphasis in original.)

The letter sent to Armour by Lutheran Family Services clearly complies with the notice requirements found in 43-104.13. Indeed, the letter specifically directed him to file a "special form" with the Department within five business days of his receipt of the letter. Armour testified that upon receiving the letter he did so. (27:3-25; 28:1-4) Armour identified Exhibit 1 as a certified copy of the notice he filed with the Department on August 4, 1998. (33:19-25) Exhibit 1 provided:

> I understand that if a petition is not filed in the *county* court in the County of residence of said child for an adjudication of my claim of paternity and right to custody *within thirty (30) days after the filing of this notice,* my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

(E1,1:4, Vol. II) (Emphasis supplied.) The foregoing language in the notice was consistent with the language found in NEB. REV. STAT. § 43-104.05 (Reissue 1998), and was a correct statement of the law on August 4, 1998. *See Armour v. L.H.,*

259 Neb. 138, 608 N.W.2d 599 (2000). Therefore, as of August 4, 1998, at the very latest, Armour was on notice as to what he needed to do in order to protect his opportunity to form a relationship with Baby Girl H. Armour complains that if a putative father misses the thirty-day filing deadline he is presumed to be unfit and the statute operates to "automatically terminate" his parental rights without requiring proof of "anything" and as such is fundamentally unfair. He also claims that the thirty-day deadline does not afford a putative father sufficient time to establish a relationship with his child. (Petitioner's brief at 18-20) Armour's argument completely overlooks the facts of this case. In fact, he *did* file his notice with the Department within five business days, and he *did* file a petition within 30 days of filing his notice. (E1,1-3:4, Vol. II) (E9,2-4:19, Vol. II) However, he filed his petition in the *wrong* court. *Armour, supra.* Had he filed his petition in the proper court, he would have been entitled to a hearing "not less than twenty nor more than thirty days" after such filing. NEB. REV. STAT. § 43-104.05. At that hearing, pursuant to § 43-104.22, the trial court's focus would have been twofold: 1) whether Armour was actually the father of the child; and 2) whether Armour was a fit, proper and suitable custodial parent for the child.[2]

Both this Court and the Nebraska Supreme Court have held that a putative father's ignorance of the law will not relieve him of his obligation to follow the law. *See Lehr v. Robertson,* 463 U.S. 248, 264 (1983) (the possibility that the

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[2] The full text of 43-104.22 is set forth at Pet.'s Appendix F20-22. No such hearing has ever been held because Armour failed to file his petition in the proper court, either within the 30-day time frame or any time thereafter.

putative father may have failed to follow the law because of his ignorance of the law cannot be sufficient reason for criticizing the law itself); *Shoecraft v. Catholic Soc. Servs. Bureau*, 222 Neb. 574, 580, 385 N.W.2d 448 (1986) (putative fathers, like all citizens, are presumed to know the law; statutes of limitation bar evenly the claims of the wary and the unwary, the just and the unjust).

Armour's arguments also overlook the fact that this Court has held that legitimate state interests justify requiring an unwed father to "adhere precisely" to the procedural requirements of the statutes which afford him the opportunity to assert any alleged claims he may have to his child.

> The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.

Lehr, supra, 463 U.S. at 265. In the case at bar, legitimate state interests justify requiring Armour to adhere precisely to the procedural requirements of 43-104.05. Armour received adequate notice, he filed the proper form with the Department, and he filed a petition, albeit in the wrong court. It was not an *inability* to comply with 43-104.05 that created the problem, it was ignorance of the law. Additionally, it is noteworthy that Armour has yet to offer any explanation as to why he has never filed a petition in the Gosper County Court despite the fact that as of the September 15, 2000 hearing he

had had over two years to do so. Consequently, Armour's claim that 43-104.05 "automatically terminated" his parental rights is simply not supported by the record. Further, Armour's assertion that 43-104.05 allows the trial courts no discretion in applying the law or in providing notice to putative fathers overlooks both § 43-103[3] and pertinent Nebraska jurisprudence.[4]

C. The Thirty-Day Filing Requirement Found in § 43-104.05 Furthers Important Nebraska Objectives and is a Logical Extension of *Lehr*.

Armour asserts that the Supreme Court in *Lehr* "did not condone" a thirty-day filing deadline such as the one found in 43-104.05. Petitioner's brief at 18. However, *Lehr* does not preclude such a statutory provision. The thirty-day provision does nothing more than require the natural father to follow through on his stated intent to claim paternity and request custody. Without such a requirement, the child, the natural mother and the prospective adoptive parents are left in limbo indefinitely. The child either cannot be placed for

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[3] The full text of 43-103 is set forth at Petitioner's Appendix F3, but provides in relevant part: "The court may require notice of the [adoption] hearing to be given . . . to the parent or parents of the child, and to such other interested persons as the judge may, in the exercise of discretion, deem advisable . . . "

[4] Armour's claim that 43-104.05 automatically terminates the parental rights of any father of a child born out of wedlock, even if a father "has had contact with the child, established a familial relationship, and financially supported the child", ignores Nebraska case law to the contrary. *See In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987) and cases cited therein.

adoption or, if placed, runs the risk of having that placement disrupted. The right to seek and obtain the hearing he now requests was completely within Armour's control. That he may have failed to do so because of his ignorance of the law is not sufficient reason for criticizing the law itself. *Lehr v. Robertson,* 463 U.S. at 264.

D. Nebraska's Distinction Between Unwed Fathers Whose Children are Being Placed for Adoption and Unwed Fathers Whose Children are Not Being Placed for Adoption Serves a Legitimate State Interest and Does Not Run Afoul of the Equal Protection Clause of the Fourteenth Amendment.

Armour premises his equal protection argument on the assertion that Nebraska adoption statutes impermissibly draw a distinction between married fathers and unmarried fathers, and that such distinction does not pertain to a substantial or important governmental interest. Petitioner's brief at 22. In actuality, the distinction drawn by Nebraska statutes is one between unwed fathers whose children are being placed for adoption and unwed fathers whose children are not being placed for adoption. NEB. REV. STAT. § 43-104.05. NEB. REV. STAT. § 43-1411. The need for the distinction is obvious. When the natural mother of a child born out of wedlock decides to place her child for adoption, important and legitimate governmental interests come into play and must be balanced against the natural father's constitutionally protected rights. The interests of the natural mother, the child and the prospective adoptive parents must also be taken into consideration. The Nebraska Legislature has

enacted two different statutory schemes in order to protect the interests involved and to achieve the balance sought.

Once a natural mother decides to place her child for adoption, the natural father is notified of the mother's decision and 43-104.05 sets forth the procedural steps the father must take to assert any alleged rights he may have to the child. If the father complies with the five-day and thirty-day deadlines in 43-104.05, he will be afforded a hearing on paternity and fitness pursuant to 43-104.22. That is true regardless of the age of the child at the time the mother decides to place the child for adoption. The five-day deadline does not begin to run until the birth of the child or the father's notification of the impending adoption "whichever is later." NEB. REV. STAT. § 43-104.02 (Pet's Appendix F6). Following the filing of his notice of intent to claim paternity and obtain custody, the father must file his petition for paternity and custody within thirty days. NEB. REV. STAT. § 43-104.05. He then is entitled to his hearing on paternity and fitness.

In cases where an unwed mother elects to keep and raise her child, the natural father's right to assert his claims to paternity and custody are governed by NEB. REV. STAT. § 43-1411 (Reissue 1998). (Respondents' Appendix B). That statute allows (in cases other than adoption) four years for either parent to petition the court for a determination of paternity and custody. Thereafter, the child, by and through a guardian or next friend, can petition the court for a determination of paternity and custody until the child's eighteenth birthday. The more stringent time frames set forth in 43-104.05 are not implicated until and unless the natural mother decides to place the child for adoption. These two statutory schemes address the necessary distinction between

two classes of unwed fathers and further important governmental interests. The more stringent time frames found in 43-104.05 serve an important purpose in cases where the child is being placed for adoption and are necessary to achieve expediency, security and finality in adoptions, factors not present in cases where the child is not being placed for adoption.

II. THE NEBRASKA SUPREME COURT CORRECTLY DETERMINED THAT ARMOUR DOES NOT HAVE STANDING TO ASSERT THE RIGHTS OF REAL OR IMAGINED THIRD PARTIES, AND DOES NOT HAVE STANDING TO INVOKE THE COURT'S REMEDIAL POWERS CONCERNING HYPOTHETICAL OR FICTITIOUS ISSUES.

In his brief submitted in the Nebraska Supreme Court, Armour repeatedly attempted to assert the rights of third parties. For instance, he attempted to assert what he apparently perceives as L.H.'s right to invalidate her consent and relinquishment (Armour's Nebraska Supreme Court brief at 15); Baby Girl H.'s "right" to her medical history (Armour's Neb. Sup. Ct. brief at 19-20); what he perceives as Baby Girl H.'s "right" to require an updated home study consistent with Armour's interpretation of the "purpose" of NEB. REV. STAT. 43-107 (Armour's Neb. Sup. Ct. brief at 22-23); Baby Girl H.'s "right" to have a guardian or guardian ad litem sign a substitute consent in lieu of Armour's consent to adoption (Armour's Neb. Sup. Ct. brief at 23-25); the rights of a hypothetical comatose putative father (Armour's Neb. Sup. Ct. brief at 31-32); the rights of a hypothetical putative father facing hypothetical castration (Armour's Neb. Sup. Ct. brief at 32); the rights of a hypothetical single woman facing

a hypothetical forced abortion (Armour's Neb. Sup. Ct. brief at 32); the rights of a hypothetical putative father who did not meet the thirty-day deadline in 43-104.05 for a variety of hypothetical reasons (Armour's Neb. Sup. Ct. brief at 32-33); the rights of a hypothetical putative father who did not know the county in which to file his petition (Armour's Neb. Sup. Ct. brief at 33); the rights of a hypothetical putative father who did not receive notice under 43-104.13 as Armour believes the statute *should be* written (Armour's Neb. Sup. Ct. brief at 34); and so on. *Those* were the assertions and legal arguments to which the Nebraska Supreme Court responded in its decision of November 2, 2001 pertaining to the issue of standing. In his petition to this Court, Armour frames the issue differently and claims that he should have been given notice and an opportunity to be heard at the adoption hearing, and that had he been given notice he would have appeared and objected to what he alleges were errors made by the trial judge at that hearing. Petitioner's brief at 22. Although his claims have been refined and restated in his petition to this Court, the legal analysis does not change. The Nebraska Supreme Court held:

> In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. [Internal citations ommitted.] The issues regarding the final adoption hearing and decree arose out of proceedings that Armour was not a party to and not required to be given notice of. Armour is attempting to assert the legal interests of third parties. Because Armour lacks standing, we do not address his remaining assignments of error.

In re Adoption of Baby Girl H., 262 Neb. 775, 787, 635 N.W.2d 256, 266 (2001).

The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2301-2302, 124 L.Ed.2d 586 (1993). *See also Miller v. City of Omaha*, 260 Neb. 507, 518, 618 N.W.2d 628 (2000). Here, Armour is not situated the same as the individuals in the foregoing hypothetical situations. He would not benefit from a more complete medical history from L.H., or a completed and signed medical history from himself. Further, Armour is not in a coma, nor is he facing castration or a forced abortion. Standing requires that a litigant have such a *personal* stake in the outcome of the controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Orr v. Orr*, 440 U.S. 268, 291, 99 S. Ct. 1102, 1118, 59 L.Ed.2d 306 (1979); *Miller, supra*, 260 Neb. at 518. In order to have standing, Armour must assert his own legal rights and interests; he cannot rest his claims on the legal rights or interests of third parties. *Id.* In addition, Armour must argue the facts of his own case. An actual case or controversy is necessary for the exercise of judicial power. *Prieser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 2334, 45 L.Ed.2d 272 (1975); see also *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 460, 598 N.W.2d 729 (1999). A court does not offer advisory opinions but decides real controversies and determines rights actually controverted. A court does not address or dispose of abstract questions or issues that might arise in a hypothetical or

fictitious situation. *Northeastern Florida Chapter of the Associated General Contractors of America, supra,* 508 U.S. at 663, 113 S. Ct. at 2302. See also, *In re Interest of Kantril P. & Chenelle P., supra,* 257 Neb. at 460. Contrary to Armour's assertions, his presence or absence at the adoption hearing, for purposes of raising these claimed errors, was irrelevant. He cannot assert the rights of third parties, period. *See Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976).

Finally, even if the Court were inclined to review the claims set forth on page 22 of Armour's brief, many of Armour's complaints can be disposed of by recognizing that the standard applicable to a Nebraska court's determination of compliance with sections 43-104.08 through 43-104.16 is not strict compliance, it is substantial compliance, and a trial court may properly enter a decree of adoption in Nebraska so long as there is substantial compliance with said sections. *See* NEB. REV. STAT. §§ 43-104.18 and 43-104.23 (Reissue 1998).[5]

Further, at least some of Armour's assertions regarding alleged errors committed by the trial judge border on frivolous. For instance, Armour argued in the Nebraska Supreme Court, and now in this Court, that the trial judge impermissibly conducted the adoption hearing more than four weeks after the filing of the petition for adoption. Petitioner's brief at 22. NEBRASKA REVISED STATUTE § 43-103 does not require that the petition be heard within four weeks.[6] If Armour is

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[5] The full text of 43-104.18 is set forth at Petitioner's Appendix F19-20. The full text of 43-104.23 can be found at Respondents' Appendix C.

[6] The full text of 43-103 is set forth at Petitioner's Appendix F3. It requires a court to hear a petition *not less than four nor more than eight weeks* after filing.

asserting that the trial court heard the petition beyond the eight-week time frame set forth in 43-103 he has neglected to point out that it was due to *his* request for an extension of time to allow his attorney to prepare for the September 15, 2000 hearing which was four days beyond the eight-week time frame. (7:22; 8:7-9) The hearing on the adoption petition was held six days later on September 21, 2000. (Pet's Appendix C). Finally, Armour *benefited* from the ten-day extension, and it in no way undermined any of the procedural or substantive rights to which he claims to be entitled. It is well established in Nebraska that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. *Missouri P. R. v. Fox*, 60 Neb. 531, 83 N.W. 744 (1900), *overruled in part on other grounds, Callahan v. Prewitt*, 143 Neb. 787, 800, 13 N.W.2d 660, 663 (1944). The statutory errors that Armour claims were made by the trial judge at the adoption hearing are purely matters of state law and, thus, do not merit the invocation of this Court's jurisdiction.

III. AMONG THE STATES WHICH HAVE ADDRESSED SIMILAR SITUATIONS SINCE *LEHR*, COURTS HAVE CONSISTENTLY AFFORDED UNWED FATHERS DUE PROCESS AND EQUAL PROTECTION IN ACCORDANCE WITH FEDERAL PRECEDENT.

Armour asserts that state courts of last resort have handed down conflicting decisions regarding the constitutionality of state statutes that permit the adoption of children born out of wedlock. Petitioner's brief at 28. However, a close review of the decisional law set forth by Armour on

page 29 of his brief reveals adherence by the courts with federal constitutional precedent as enunciated by this Court. In each instance, the court analyzed the statute(s) in question, the specific facts of the case and the constitutional rights implicated. Some of the questioned statutes were held unconstitutional while others were upheld as constitutional. That fact does not render those cases inconsistent with the Nebraska Supreme Court's holding in *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), nor does it create a "conflict" among the courts of last resort in this country. To the contrary, those decisions show consistency across the nation in interpreting and applying pertinent federal constitutional law.

CONCLUSION

The Nebraska statutory adoption scheme is both facially constitutional, and constitutional as it was applied to Armour in this case.

The State of Nebraska has legitimate and compelling interests in the well being and the nurture and care of all children in Nebraska. The statutory provisions requiring a putative father to file a notice with the Department within five days and a petition in the county court within thirty days bear a direct relation to important governmental objectives. This case presents a stark example of the precise need for requiring putative fathers such as Armour to comply precisely with 43-104.05. Without the thirty-day filing requirement, Armour could file his five-day notice of intent and then elect to do nothing, leaving L.H. and Baby Girl H. in limbo indefinitely. The thirty-day requirement is a logical

extension of *Lehr* and affords putative fathers ample time to request a hearing on paternity and fitness in the proper court. His failure to do so was the result of his ignorance of the law and his subsequent inaction. Baby Girl H. is now three and one-half years old. Had Armour complied with the provisions of 43-104.05, a determination of his paternity and right to custody would have been made before she was three months old. The ability to comply with 43-104.05 was at all times within Armour's control. Section 43-104.05 is a reasonable, indeed necessary, means of accomplishing stability and certainty in adoptive relationships. K.D.G. and T.S.G. urge this court to deny Armour's petition for writ of certiorari.

Respectfully submitted,

K.D.G. and T.S.G., Respondents

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APPENDIX A

Date: May 15, 2000

(Filed May 16, 2000)

NEBRASKA SUPREME COURT

To: Gosper County District Court, Nebraska

WHEREAS, in a late action in your court, captioned:

Armour v. Huffman

you rendered judgment.

And, **WHEREAS**, the petitioner, Luke Armour prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF, the appeal from the judgment which you rendered has been dismissed

by the Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by appellant and are taxed at $52.00.

WITNESS the Honorable John V. Hendry, Chief Justice, and the seal of this court.

[SEAL]

Lanet S. Asmussen
Clerk of the Supreme Court

/s/ Jan Culver
Deputy Clerk

Supreme Court No.

S-98-1232

Trial Tribunal No.

3591

Date Opinion Issued

04/07/00

COSTS IN THE SUPREME COURT

Cost Due Clerk Supreme Court	$ -0-
Paid by District Court Clerk	$50.00
Legal Srvs. fee paid	$ 2.00
Total Costs	$52.00

Costs should be distributed in accordance with Neb. Rev. Stat. § 25-1915.

APPENDIX B

43-1411. Paternity; action to establish; venue; limitation; summons. A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth, unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth. Summons shall issue and be served as in other civil proceedings, except that such summons may be directed to the sheriff of any county in the state and may be served in any county.

Source: Laws 1941, c. 81, § 11, p. 325; C.S.Supp., 1941, § 43-711; R.S.1943, § 43-1411; R.S.1943, (1983), § 13-111; Laws 1985, Second Spec. Sess., LB7, § 75; Laws 1986, LB813, § 1; Laws 1991, LB457, § 16; Laws 1993, LB 500, § 54; Laws 1994, LB1224, § 59; Laws 1995, LB712, § 29; Laws 1998, LB1041, § 45. Operative date July 1, 1998.

APPENDIX C

43-104.23. Child born out of wedlock; order finalizing adoption without biological father's notification; when; appeal. If, after viewing the evidence submitted to support a petition to finalize an adoption or any evidence submitted by a guardian ad litem if one is appointed, the court determines that no biological father can be identified, or that no identified father can be notified without likely threat to the safety of the biological mother or the child, or upon a finding of due diligence and substantial compliance with sections 43-104.08 to 43-104.16 and a finding that no biological father has timely filed under section 43-104.02, the court shall enter an order finalizing the adoption of the child. Subject to the disposition of an appeal, upon the expiration of thirty days after an order is issued under this section, the order shall not be reversed, vacated, or modified in any manner or upon any ground including fraud, misrepresentation, or failure to provide notice under sections 43-104.12 to 43-104.14.

Source: Laws 1995, LB712, § 16.